JD(ATL)–06-03
Semmes, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ASA, INC.

and

Case Nos. 15-CA-16584-1
15-CA-16584-2
15-CA-16584-3

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 903, AFL-CIO

Kevin McClue, Esq. for the General Counsel.
Thomas Glidewell, Esq., of Mobile, AL, for the Respondent.
Mr. James Kidd, Jr., of Gulfport, MS, for the Charging Party.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge. This case was tried in Biloxi, Mississippi on November 12, 2002. The charges in all three above-titled cases were filed May 6, 2002[1] by the International Brotherhood of Electrical Workers, Local Union No. 903, AFL-CIO (Union or IBEW). The complaint, which was issued July 31, alleges that ASA, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended, (Act) by interrogating its employees about their union membership, activities, and sympathies, and it violated Section 8(a)(1) and (3) of the Act by (a) failing to consider for hire and refusing to hire James Kidd and David Simmons, and (b) terminating David Brown because, like Kidd and Simmons, he joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. The Respondent denies violating the Act.

General Counsel's motion to reject Respondent's brief pursuant to Section 102.114(g) of the Board's Rules and Regulations is hereby granted. On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by Counsel for General Counsel, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation with its principal office and place of business in Semmes, Alabama and a job site in Biloxi, admits that it has been engaged in business as an electrical contractor in the construction industry where it annually performed services valued in excess of $50,000 in states other than the State of Alabama. The Respondent, however, denies the complaint allegation that in conducting its business operation during the time material herein it annually purchased and received at its Mississippi job site goods valued in excess of $50,000 directly from points outside the State of Mississippi. In its answer to the complaint, the Respondent demanded strict proof of this allegation. The Respondent admits and I find that it is

[1] All dates are in 2002 unless indicated otherwise.

an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Section 10 of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice affecting commerce." While it was not required by Congress, the National Labor Relations Board (Board) has set standards specifying the minimum annual dollar amounts which must be met before the Board will assert jurisdiction. For nonretail operations, the Board will assert jurisdiction when gross interstate purchases (inflow) or, as here pertinent, services (outflow), whether direct or indirect, is at least $50,000.00. Here since the Respondent admits that annually in conducting its business operations it performed services valued in excess of $50,000.00 in states other than the State of Alabama, it is not necessary for Counsel for General Counsel to also prove that annually the Respondent purchased and received at its Mississippi job site, goods valued in excess of $50,000.00 directly from points outside the State of Mississippi. The Board has jurisdiction over this matter.

II. Alleged Unfair Labor Practices

The Respondent, a family business, was incorporated in January 2002. It is co-owned by Darrell McIntyre, his father Doug McIntyre, and Melvin Pierce. Darrell McIntyre is the Vice President and Director of Operations. The Respondent was the low bidder on the commercial electrical work on Surf Style Shop, a retail outlet in Biloxi. The job started around Christmas 2001. Schuler Contracting, of Gulfport, Mississippi, was the general contractor on the project. Darrell McIntyre hired employees for this job. He testified that if he did not know a job applicant, he would ask them to send him a resume, he would review it, and then he would ask the applicant to come in for a face-to-face interview to determine their qualifications.

On January 22, Simmons, an organizer for the Union, responded to a newspaper ad for electricians. He spoke with Darrell McIntyre, and then faxed his resume, along with Kidd's resume, to McIntyre, General Counsel's Exhibit 3. Later that day Simmons telephoned Darrell McIntyre to verify that he had received the fax. Darrell McIntyre indicated that he received the fax but he did not have time to look at it yet.[2] A transcript of Simmons' tape recording of this conversation was received without objection as General Counsel's Exhibit 4. During this telephone conversation Darrell McIntyre told Simmons that he had Simmons' telephone number and he would call Simmons back "as soon as … [he got] a chance to sit down and breathe." Darrell McIntyre did not telephone Simmons back, and neither Simmons not Kidd went to the Biloxi job site to inquire about the status of their job application. Simmons has been doing electrical work for 30-plus years and he has experience doing commercial electrical work. Also, Simmons testified that when Darrell McIntyre did not call him back he telephoned McIntyre within a few days but he was never able to reach him. Darrell McIntyre testified that he is not obligated to call job applicants back but he has done it; that he has offered people who were with the union work but he has not offered employment to union organizers; and that it was his standard practice pretty much to tell job applicants who telephoned to come to the job site.

Later on the same day Brown came into the Union hall and Kidd, who is an organizer for the Union, and Simmons told him about the above-described ad. When Simmons drove Brown to the job site in Biloxi he pulled into the parking lot and waited in the vehicle while Brown went in to apply for a job. Brown recorded his job interview with Darrell McIntyre. The transcript of the recording was received without objection as General Counsel's Exhibit 5. During the interview Darrell McIntyre (1) asked Brown to get a resume for him, (2) told Brown that there

[2] More specifically Simmons asked "Did you get our fax" to which Darrell McIntyre answered "I did I haven't had a chance to look at it man."

was only a couple of weeks left in the job, (3) asked Brown "[y]ou work, what'd you work, you work union, open shop what do you work,"[3] and (4) told Brown that he wanted a hard working guy that knows what he is doing, and he had already had three people that he brought on and had to get rid of them in a day. While he was in the Respondent's trailer at the job site Brown saw Simmons' fax cover sheet with the Union logo on it, General Counsel's Exhibit 3, tacked up on the wall of the trailer. Darrell McIntyre testified that there were other resumes tacked on the trailer wall also; and that he did not recall seeing Kidd's resume.

On January 22, according to the testimony of Darrell McIntyre, an employee with the surname of Byrd started working for the Respondent, and about 9 a.m. that day McIntyre was told that Byrd was gone. Jonathan Garvin began working for the Respondent on the morning of January 22. According to the testimony of Darrell McIntyre, Garvin asked him for a job on January 21. He was hired as a helper at $8 an hour.

On January 23 Darrell McIntyre telephoned Brown and told him that he assumed that Brown was coming to the job site that morning. Brown told him that he would be there in about 45 minutes. Brown started working as a foreman for the Respondent that day at $17 an hour.

According to the testimony of Darrell McIntyre, two employees, Knapp and Robert Luszcz began to work for the Respondent at the involved job site on January 23. Darrell McIntyre testified that he received the resume for Luszcz, who is a union electrician, the week before he started working and he had spoken to him prior to January 23, informing him that he was to be employed. [4] Darrell McIntyre also testified that Knapp was only hired to wire four parking lot lights.

On January 25 Wilkerson, who is not an electrician, began working for the Respondent. Darrell McIntyre testified that Wilkerson never worked at the involved job site and he just transported materials back and forth from Mobile, Alabama.

On January 28 Leaghty and Spencer began working for the Respondent. Darrell McIntyre testified that he interviewed Leaghty face-to-face and determined his qualifications as an electrician by asking him to explain his experiences; that he spoke with Jerry Rhodes, who is an electrical inspector for the city of Biloxi, about Leaghty; that he spoke with someone in an electrical supply house in Biloxi about Leaghty; that Spencer came in for a face-to-face interview with him; and that he asked the same questions of Spencer that he asked of the other job applicants.

Around the end of January or the beginning of February 2002 Jason Parker, who is an active member of IBEW Local 505, applied for a job with the Respondent. He testified that he spoke with Darrell McIntyre, who knew that he was in the Union, and he was offered a job at the Biloxi job site. Parker did not tell Darrell McIntyre that he was going to organize the employees of the Respondent. Parker testified that he did not show up to work for the Respondent because when he told the Union that he was going to work for the Respondent he was advised that he would have to help in the organizing effort of the involved local; and that he told Darrell McIntyre that he decided not to go to work for him because he could be fined by his local for doing non-union electrical work with a company where there is an organizing effort taking place.

---

[3] Brown replied "[n]ah, I'm non-union."

[4] Counsel for General Counsel's objection to any testimony regarding Knapp's application and hire date was sustained since the Respondent had not produced any documentation on Knapp to Counsel for General Counsel pursuant to his subpoena.

Before working hours on February 4, Brown left a message on the Respondent' s answer machine at the job site indicating that he had personal business to take care of at his son's school, and he would be a little late getting to work. Brown testified that he thought that the conference with the principal and his son was about 9 or 10 a.m. on February 4; and that the conference with the principal finished before lunchtime but Brown had to go back to the school later that day. He telephoned Darrell McIntyre and left a message for him indicating that he would be at work around lunchtime. Later in the day Brown telephoned Darrell McIntyre and told him that he would not be able to come to work that day. Brown testified that during this last telephone call on February 4 Darrell McIntyre did not tell him that he was fired, he did not say that what was happening was unacceptable, and he did not tell him to come in. Brown did not believe that his absence on February 4 was a violation of any work rule. The Respondent had never given him an absentee work rule policy. At about 4 or 5 p.m., according to Brown's testimony, he went to the Union hall to get a letter from Kidd to Darrell McIntyre indicating that he, Brown, was a union organizer.

When he reported to work at 7 a.m. on February 5 Brown gave the following letter, General Counsel's Exhibit 6, to Darrell McIntyre:

> This is to inform you that David L. Brown is a Voluntary Union Organizer for Local Union 903-IBEW. He will abide by all rules and regulations of Melvin Pierce Paint Company, and I trust that Melvin Pierce Paint Company will abide by all standards of the National Labor Relations Board.
>
> At your earliest convenience, I would like to sit down with your and your company representatives to discuss signing a Letter of Assent with Local Union 903-IBEW.
>
> If there is any harassment of this volunteer union organizer, or broken rules of the National Labor Relations Act, Local Union 903, International Brotherhood of Electrical Workers, will pursue this issue to the fullest extent of the law.
>
> Looking forward to meeting with you.

The letter is signed by Kidd. When Darrell McIntyre received the letter from Brown he asked him what it was. Brown told McIntyre that he was a Union organizer, the Union wanted him to give the letter to McIntyre, and he asked McIntyre if he wanted to meet with the Union. McIntyre declined and assigned some work to Brown while they waited for some wire to be delivered so it could be "pulled. "

Shortly after his conversation with Darrell McIntyre on the morning of February 5 Brown had a conversation with his helper, Garvin. Brown told Garvin that he would be over at his truck at 9 a.m., which is break time, to talk to him about the Union, and if he wanted to, he could tell Darrell McIntyre. Darrell McIntyre testified that he did not ask Garvin to watch Brown; that he told Garvin that he did not have a problem with discussions about union activities as long as they did not occur on the Respondent's time; that he has told his employees that he does not want them discussing hunting and fishing on the Respondent's time because it distracts from the work in progress; that he spoke to Garvin on February 5 because Brown had just announced that he was going to organize the job on breaks and at lunchtime, which he was okay with; that he told Garvin that if Brown did discuss union activities at 8 a.m. while he was supposed to be working then he wanted to know about it; and that he did not tell Garvin to say anything to Brown with respect to discussing union activities other than on break.

At about 5 minutes before 9 a.m. that morning Darrell McIntyre told Brown that he did not need him anymore, things were winding down, and he was letting some people go. Darrell McIntyre did not tell Brown that he was being terminated for being absent the day before. Brown testified that while he was writing his address so that the Respondent could send him his last paycheck, Darrell McIntyre said that he had been in the union and that the union covers up for incompetent people. When Brown then asked Darrell McIntyre if he was not satisfied with him, McIntyre said he did not say that.

Darrell McIntyre testified that before Brown reported for work in February 5 he had decided to terminate him for his absenteeism; that the Respondent did not have any policy in effect at the time regarding absenteeism; that he doubted that Brown was truthful regarding his absence on February 4; that Brown's absence on February 4 caused disruptions on the project; that he did not tell Brown that he was terminated when he came to work on February 5 because he had to give the employees their assignments for the day and he had an 8 a.m. meeting with the superintendent for the general contractor on the project; that after he had given out work assignments that morning Brown, who had been given a work assignment, came back to the trailer about 7:15 a.m. and gave him a letter indicating that he was a union organizer; that he did not discharge Brown at that point in time because he had more important things to do; that some of the men had questions for him that Brown could not answer and so he had to address those questions; that he met with the general contractor's superintendent at 8 a.m. and the superintendent told him that he could begin staffing down; that he then addressed two problems involving the pulling of wire and then he spoke with Brown; that he told Brown that he was staffing down and he was going to let him go; that it is the Respondent's policy to lay off those employees making the most money first; that he let Brown go because of what happened on February 4 and the fact that the general contractor's superintendent told him that he could start staffing down; that after he laid Brown off he told Brown that he had worked for a union and that he had met some incompetent union and nonunion people; that other employees were laid off the same week as Brown; that Luszcz was also making $17 an hour[5]; and that he decided to terminate Brown at 11 p.m. on February 4.

The week after he was laid off Brown went to Semmes to pick up his paycheck. At that time he was also given a payroll status change form, General Counsel's Exhibit 7, which gives the following reason for change: "Reduction in work force." The form is signed by Doug McIntyre.

By position statement dated June 19, General Counsel's Exhibit 2, the Respondent's former attorney, William Tidwell, advised Region 15 of the Board, in part, as follows:

> When the company began to reduce its work force, in most cases, for economic reasons, it terminated the higher paid employees. Eight employees had already been laid off (i.e. terminated) before Mr. Brown was terminated on February 5, 2002. They were Byrd ($17.00), Huseseaux ($17.00), Knapp ($16.00), Leaghty ($17.00), Lynde ($8.00), Sanders ($17.00), Stiglet ($8.00), and Vincent ($15.00). Those eight included four of the five employees (other than Mr. Brown) paid the top rate ($17.00 per our). Only one top rate employee (Luszez) worked longer than Mr. Brown, and he was terminated only eight days later on February 13, 2002. [Footnote omitted]

Footnote 2 of the position statement indicates "[a] total of 20 employees worked on the crew at one time or another. Six received the highest rate of pay, $17.00 per hour. See Exhibit A

[5] He was laid off on February 13.

(attached to the position statement), a summary of all employment on the Biloxi project."

Analysis

Paragraph 7 of the complaint, as amended at the trial, alleges that about January 22 Respondent by Darrell McIntyre at the job site interrogated its employees about their union membership, activities and sympathies. Darrell McIntyre did not specifically deny that he asked Brown on January 22 if he worked union or open shop. Brown's testimony is credited. At this point in time Brown was not openly organizing the Respondent's employees, and he had not declared, verbally or by wearing union paraphelnia, his support for the Union. Indeed, when he was unlawfully interrogated by Darrell McIntyre, Brown said that he was non-union. The interrogation, during a job interview by one of the owners of the Respondent, was coercive. To the extent Darrell McIntyre unlawfully interrogated Brown, the Respondent violated the Act as alleged in paragraph 7 of the complaint.

Paragraph 8 of the complaint alleges that about January 22 Respondent failed to consider for hire and refused to hire Kidd and Simmons because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. As set forth by the Board in *FES*, 331 NLRB 9, 12 (2000),

> The issues raised by the case, which are largely evidentiary and procedural, go to the most fundamental rights guaranteed by the Act. Protecting the exercise by workers of full freedom of association and self–organization is an express, central policy of the Act. See NLRA, Section 1. Unquestionably, the denial to employees of access to the work force because of their union activity or affiliation runs directly against this policy. The Board's treatment of allegations of discriminatory refusals to consider or to hire and its determination of related remedial issues is a measure of the Board's effectiveness in giving substance to the rights it is charged to protect.
>
> ….
>
> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.
>
> If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or

> affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them. [Footnotes omitted]

And as set forth by the Board in *FES*, supra at 15

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.
>
> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions. [Footnotes omitted]

Regarding the alleged failure to consider for hire allegation, it is noted that while Darrell McIntyre testified that he is not obligated to call job applicants back, he has done so, and that it was his standard practice pretty much to tell job applicants who called in to come to the job site. Why didn't he do this with Simmons and Kidd? Could it be because he was put on notice by their January 22 fax that they were union organizers? Later that same day one of the things Darrell McIntyre did with Brown before he decided to hire him was ask him if he worked union or open shop. After Brown assured him that he was non-union he was called back by Darrell McIntyre with a job offer. Obviously being non-union was meaningful to Darrell McIntyre or he would not have asked this question. Counsel for General Counsel has demonstrated that Respondent excluded Simmons and Kidd from the hiring process. Darrell McIntyre did not follow his standard operating procedure with them. He did not tell them to come to the job site for a face-to-face interview. Counsel for General Counsel has also demonstrated that antiunion animus contributed to the decision not to consider Simmons and Kidd for hire in that Darrell McIntyre (1) was willing to unlawfully, coercively interrogate Brown to make sure he was not in the union before hiring him, and (2) unlawfully terminated Brown when Brown gave him a letter from the Union indicating that Brown was a union organizer and Brown told an employee that he was going to discuss the Union with him during the next break. The Respondent did not show that it would not have considered Simmons and Kidd even in the absence of their union activity or affiliation. Darrell McIntyre was trying to avoid any liability to Kidd by falsely claiming that he did not recall seeing Kidd's resume. The Respondent apparently appreciated the fact that it would have been difficult to argue that it would not have considered Kidd even in the absence of his union activity or affiliation when Darrell McIntyre was not even willing to admit that he knew about Kidd. With Simmons, the Respondent did not show that it would not have considered him even in the absence of his union activity or affiliation. As alleged, the Respondent unlawfully failed to consider Simmons and Kidd for hire.

Regarding the alleged unlawful refusal to hire Simmons and Kidd, Counsel for General

Counsel has shown that the Respondent was hiring, that Simmons and Kidd had experience and training relevant to the positions for hire, and that antiunion animus contributed to the decision not to hire Simmons and Kidd. The Respondent has not shown that Simmons and Kidd were not qualified for the positions it was filling or that Brown, Knapp, Leaghty, or Spencer had superior qualifications, and the Respondent would not have hired Simmons and Kidd for that reason even in the absence of their union support or activity.[6] The Respondent violated the Act by refusing to hire Kidd and Simmons because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Paragraph 9 of the complaint alleges that about February 5 Respondent terminated Brown because he joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

As set forth by the Board in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991):

> In *Wright Line*, 251 NLRB 1083 (1980), … [supra] the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the Respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Footnotes omitted]

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus, and adverse action taken against the employee involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

Counsel for General Counsel has demonstrated that Brown engaged in union activity, the Respondent knew of Brown's union activity when he was terminated, there was antiunion animus on the part of the Respondent, and taking adverse action against Brown had the effect of discouraging union activity. General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision.

Has the Respondent demonstrated that the same action would have taken place notwithstanding the protected conduct? The problem with Respondent's case as it relates to the termination of Brown is that it relies almost exclusively on the testimony of Darrell McIntyre, and

[6] It appears that this group may also include Luszcz in that while Darrell McIntyre testified that he hired Luszcz before January 23, Darrell McIntyre did not specifically indicate when he hired Luszcz. More specifically, Darrell McIntyre did not rule out the possibility that, as with Brown, he hired Luszcz on January 22 after Darrell McIntyre received the fax from Simmons.

he is not a credible witness.[7] Regarding what occurred on January 22, Darrell McIntyre was caught between the proverbial rock and the hard place. He admitted that he received the fax with its cover sheet from Simmons and he testified that he read all of it. Yet while the cover sheet specifically indicates that the fax included eight pages, including the cover sheet, and Simmons' resume is only one page, Darrell McIntyre testified that he did not recall seeing Kidd's name. Six of the eight pages were Kidd's resume. So before even getting to the events of February 5, Darrell McIntyre had placed his veracity in question. Then with respect to February 5, Darrell McIntyre testified that he decided to terminate Brown the night of February 4. Yet according to Darrell McIntyre's version, he does not tell Brown when he shows up for work on February 5. Indeed, Darrell McIntyre does not tell Brown that he is terminated until Brown (1) hands him a letter indicating that he is a union organizer, and (2) tells employee Garvin that he is going to discuss the Union with him on break. And when Darrell McIntyre tells Brown that he is terminated he does not indicate that it is because he was absent from work on February 4.[8] Darrell McIntyre had told Garvin the morning of February 5 that he wanted to know if Brown discussed the Union at other than break time.[9] This brings up another question, namely, if Darrell McIntyre decided on the night of February 4 to terminate Brown, why was he telling Garvin on the morning of February 5 that he wanted to know about the union activities of Brown. Why would this have been necessary if the decision had already been made to terminate Brown? Obviously Darrell McIntyre did not make the decision to terminate Brown until after Brown gave him the letter indicating that he was a union organizer and Brown spoke with Garvin indicating that he wanted to discuss the Union with Garvin. Within approximately two hours of these two events Brown was terminated. On brief Counsel for General Counsel contends that it was not a coincidence that the termination occurred a few minutes before the start of Brown's organizing campaign at 9 a.m. Not satisfied to leave the timing to speak for itself, Darrell McIntyre himself brings up the Union, making a derogatory remark, during his termination conversation with Brown.[10] The testimony of Brown is credited. The testimony of Darrell McIntyre is not credited. Absent Brown's union activity, the Respondent had not shown that it would have terminated Brown on February 5. The Respondent violated the Act as alleged in paragraphs 9 and 10 of the complaint.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

---

[7] As pointed out by Counsel for General Counsel on brief, the alleged authorization by the general contractor to reduce the Respondent's work force at the Biloxi job site was not supported by a neutral witness.

[8] Brown's termination document or payroll change status form does not refer to the February 4 absence. While the form was signed by Doug McIntyre, he did not testify at the trial herein to explain this and the "Reduction in work force" on the form.

[9] While Counsel for General Counsel argues that by soliciting Garvin to report the union activities of Brown, the Respondent violated Section 8(a)(1) of he Act, this allegation was not originally included in the complaint, Counsel for General Counsel has not sought to amend the complaint to include this allegation, and it is not included in Counsel for General Counsel's proposed conclusions of law as set forth in his brief. In these circumstances, no conclusion will reached regarding this conduct.

[10] Darrell McIntyre's testimony that he also referred to some nonunion people as being incompetent is a post hoc rationalization.

3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee about his union membership, activities and sympathies.

4. Respondent violated Section 8(a)(1) and (3) of the Act by failing to consider for hire and refusing to hire job applicants because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

5. Respondent violated Section 8(a)(1) and (3) of the Act by terminating David L. Brown because he joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

6. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily failed to consider for hire and refused to hire Simmons and Kidd, it must offer them instatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from January 22 to date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged Brown, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, ASA, Inc., of Semmes, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union affiliation, union support or union activities.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Failing to consider for hire and refusing to hire applicants on the basis of their union affiliation or based on the Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(c) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Electrical Workers, Local Union No. 903, AFL-CIO or any other union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of this Order, offer James L. Kidd, Jr. and David A. Simmons instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

Within 14 days from the date of this Order, offer David L. Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

Make James L. Kidd, Jr., David A. Simmons, and David L. Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to consider and refusal to hire James L. Kidd, Jr. and David A. Simmons, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of David L. Brown, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility in Semmes, Alabama and at all of its job sites within the jurisdiction of International Brotherhood of Electrical Workers, Local Union No. 903, AFL-CIO copies of the attached notice marked "Appendix."[12] Copies of

[12] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 22, 2002.

Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to James L. Kidd, Jr., David A. Simmons, and all employees who were employed by the Respondent at its Biloxi, Mississippi job site at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____

John H. West
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your union affiliation, union support, or union activities.

WE WILL NOT fail to consider for hire or refuse to hire job applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 903, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James L. Kidd, Jr. and David A. Simmons instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL, within 14 days from the date of the Board's Order, offer David L. Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James L. Kidd, Jr. and David A. Simmons whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, less any net interim earnings, plus interest.

WE WILL make David L. Brown whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure to consider and refusal to hire James L. Kidd, Jr. and David A. Simmons, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of David L. Brown, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ASA, Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1515 Poydras Street, Room 610, New Orleans, LA 70112-3723

(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.